Supreme Court of the United States

No. 74

BRIEF OF DOUGLAS H. MACDONALD, TRUSTEE
RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1960

No. 814

REX SCHEPP and BENJAMIN F. SHEPP,
Petitioners,

v.

PRODUCERS, INC., TRAYLOR BROS., INC., INDUSTRIAL CONTRACTORS, INC., CARL WOLF, SMITH AND BUTTERFIELD, INC., RED SPOT PAINT AND VARNISH COMPANY, INC., DOUGLAS H. McDONALD, DOUGLAS H. McDONALD, TRUSTEE, AND EVANSVILLE TELEVISION, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF DOUGLAS H. McDONALD, TRUSTEE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and judgment of the District Court are not officially reported. The opinion of the Court of Appeals for the Seventh Circuit is reported at 286 F(2d) 65 (1961).

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1961. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 11 U.S.C. 47(c), 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

Douglas H. McDonald, individually, included in the caption above, was not a party to any of the proceedings in the courts below. He was not served with copy of petitioners' brief herein in accordance with Rule 33 of the Rules of the Supreme Court, nor was any brief served on any attorney authorized to represent him. Hence, this Court has no jurisdiction of said Douglas H. McDonald, individually.

QUESTIONS PRESENTED

The following questions concerning the respondent, Douglas H. McDonald, Trustee, are presented in the petition for certiorari:

A. Whether, in a proceeding under Chapter X of the Bankruptcy Act, orders allowing compensation to the Trustee and counsel over the objections of stockholders are orders which must be appealed within the time allowed by Section 25 of the Bankruptcy Act (11 U.S.C. Sec. 48)?

B. Whether, in a proceeding for corporate reorganization under Chapter X of the Bankruptcy Act, a temporary injunction entered against answering stockholders is an order which must be appealed within the time allowed by Section 25 of the Bankruptcy Act (11 U.S.C. Sec. 48)?

STATUTES INVOLVED

Respondent Trustee accepts petitioners' citation of statutes involving the questions presented. Section 24 of the

Bankruptcy Act (11 U.S.C. Sec. 47) is also pertinent to the questions presented.

STATEMENT OF THE CASE

On December 19, 1958, a creditors' petition for the reorganization of Evansville Television, Inc. was filed. On December 22, 1958, a Receiver was appointed.

On January 2, 1959, the District Judge appointed Douglas H. McDonald as trustee of debtor corporation.

On January 30, 1959, one of the petitioners, Rex Schepp, a stockholder, filed a petition before the District Judge for permission to use debtor's office for holding a special meeting of stockholders in lieu of the annual meeting.

On February 3, 1959, the trustee filed his objections to said petition of petitioner, Rex Schepp.

On February 5, 1959, the trustee filed amended objections to the petition of petitioner Rex Schepp for permission to use debtor's office for holding a meeting of stockholders.

On February 10, 1959, the District Judge entered an order providing inter alia, "that the petition of Rex Schepp for permission to use debtor's office for holding annual meeting be, and the same is hereby denied and the Trustee's objections and amended objections thereto be and the same are hereby sustained and it is further ordered by the court that no meeting of the stockholders be called or conducted for the purpose of electing new directors either at the annual or special meeting of the stockholders of the debtor corporation, until the further order of the Court."

On May 22, 1959, October 15, 1959 and November 17, 1959, the District Judge entered separate orders, subsequent to

hearings, allowing fees and expenses to the trustee, counsel for the trustee, and the accountant for the trustee.

On February 12, 1960, the District Judge entered an order approving the petition for reorganization.

On February 23, 1960, petitioners filed notice of appeal in the District Court to the order of February 12, 1960, approving the petition for reorganization, to the injunction order of February 10, 1959, and to the orders of May 22, October 15 and November 17, 1959, respecting the allowance of compensation to the trustee, his counsel, and his accountants.

On August 11, 1960, the trustee filed in the United States Court of Appeals for the Seventh Circuit his motion to dismiss those portions of the appeal pertaining to the grant of allowances for the reasons that:

A. The notice of appeal was untimely,

B. That petitioners failed to obtain leave of court to appeal.

On September 16, 1960, the United States Court of Appeals for the Seventh Circuit dismissed said purported appeal from the orders of the District Judge dated May 22, 1959, October 15, 1959, and November 17, 1959, as untimely. (Appendices A and B).

On January 5, 1961, the United States Court of Appeals for the Seventh Circuit, in its opinion (Appendix A, pp. 37, 38 of petitioners' brief) also dismissed as untimely the injunctive order of February 10, 1959. The court below also affirmed the District Court's order of February 12, 1960, approving the petition for reorganization under Chapter X.

ARGUMENT

The Respondent Trustee's argument is directed only to the questions set forth above. With respect to those questions, it is submitted that it is abundantly clear that the decisions below by the United States Court of Appeals for the Seventh Circuit are correct, are not in conflict with any other decisions, and are well supported by the pertinent statutes and by the decisions of this court.

I.

Allowances Issue

As noted above, the District Court entered separate orders respecting allowances of compensation to the trustee, his counsel and his accountant, on May 22, 1959, October 15, 1959, and November 17, 1959, respectively. It was not until February 23, 1960, that petitioners herein filed a notice of appeal with the District Court with respect to these orders. The petitioners herein have never filed a petition for leave to file an appeal with the Court of Appeals from said orders.

Generally speaking, an appeal must be made from any order within the allotted time after the order becomes appealable or the right to appeal is waived. *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 311 U.S. 579, 44 A.B.R.(N.S.) 414, 61 S.Ct. 331, 85 L.Ed. 364 (1941). *In re Country Club Bldg. Corporation*, 49 A.B.R.(N.S.) 353, 128 F.2d 36 (7th Cir. 1942). In proceedings under Chapter X of the Bankruptcy Act, there is a special provision rendering orders making or refusing to make allowances of compensation appealable when entered. Section 250 of the Bankruptcy Act (11 U.S.C. Sec. 650) provides as follows:

> "Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this act, be taken to and allowed by the Circuit Court of Appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

The time within which such appeals must be filed is set forth in Section 25 of the Bankruptcy Act (11 U.S.C. Sec. 48) which provides as follows:

> "a Appeals under this act to the United States Court of Appeals shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry.
>
> "b Receivers and trustees shall not be required in any case to give bond when they take appeals."

In the case at bar the notice of appeal to the allowance orders of May 22, October 15 and November 17, 1959, was not filed with the District Court until February 23, 1960. It was clearly beyond the time allowed by the above statute and was, therefore, properly dismissed. (Appendix B).

Petitioners claim that the provisions of Sec. 250 of the Act should not be strictly applied. Petitioners contend that the orders were not appealable because the petition for reorganization had not been approved at the time the orders were entered. The statute, however, sets forth no such exception to its application, nor do the petitioners cite any authorities which support their contention.

Petitioners in their brief do cite the case of *A. & R. Realty Co. v. Northwestern Mut. Life Ins. Co.*, 95 F.2d 703 (8th Cir. 1938). This case is not a bankruptcy case, does not involve Sec. 250 of the Bankruptcy Act, nor does it involve any other provision of the Act.

The *A. & R. Realty Co.* case cited above involves the foreclosure by a creditor of a deed of trust. After suit was filed, a receiver was appointed. Later an order of foreclosure was entered. On appeal from the order of foreclosure, the question arose as to whether the order appointing the Receiver was also reviewable. The court said that it was, and then affirmed the order. The court did not, of course, consider whether the failure to appeal from an order making an allowance of compensation in a proceeding under Chapter X of the Bankruptcy Act constitutes a waiver of the appeal, for this question was not before the court.

The case of *In re Country Club Bldg. Corporation*, 49 A.B.R. (N.S.) 353, 128 F.2d 36 (7th Cir. 1942), did, on the other hand, deal with the application of Sec. 250 of the Bankruptcy Act. In that case, orders were entered on September 22, 1951 and October 3, 1941, awarding judgment against the appellant and in favor of the appellee as reimbursement for compensation awarded a special master and paid by the appellee in a reorganization proceeding. No notice of appeal was filed with the District Court until December 5, 1941, more than 30 days subsequent to the entry of the order appealed from. The appellant failed to seek permission from the Court of Appeals to prosecute the appeal. The court in finding that it was without jurisdiction for both of these reasons, commented as follows:

> "... Sec. 250 of the Chandler Act, 11 U.S.C.A. Sec. 650, provides the method of taking an appeal from 'orders making or refusing to make allowances of compensa-

> tion or reimbursement' and that such appeal may be 'taken to and allowed by the Circuit Court of Appeals.' That this provision, where applicable, must be complied with in order to confer jurisdiction, has been decisively adjudicated. Dickinson Industrial Site v. Cowan, 309 U.S. 382, 60 S.Ct. 595, 84 L.Ed. 819; R.F.C. v. Prudence Securities Advisory Group, 311 U.S. 579, 61 S.Ct. 331, 85 L.Ed. 364. Appellee also relies upon Sec. 25 Sub. a of the Chandler Act, 11 U.S.C.A. 48 Sub. a, which requires the taking of an appeal within 30 days after the entry of the order or decree complained of. That this requirement, if applicable, is also jurisdictional, cannot be doubted. In re Interstate Oil Corp., 9 Cir., 63 F.2d 674; In re Fox West Coast Theaters, 9 Cir., 88 F.2d 212, 221; Shreiner, et al. v. Farmers' Trust Company of Lancaster, 3 Cir., 91 F.2d 606, 607."

It is clear in the light of the above case that the time limitation of Sec. 25 of the Bankruptcy Act is jurisdictional. This court has so indicated in *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 311 U.S. 579, *supra*.

It is submitted, therefore, that the decision of the court below dismissing the appeal of the petitioners with respect to the orders making allowances of compensation on the grounds that the appeal was untimely was entirely correct.

Although the Court of Appeals below did not comment on the method by which petitioners sought appellate review of the orders in question, it is clear that petitioners' appeal was defective for an additional reason. Since the decision of *Dickinson Industrial Site, Inc. v. Cowan, et al.*, 309 U.S. 382, 60 S.Ct. 595, 84 L.Ed. 819 (1940), it has been well settled that appeals under Sec. 250 cannot be taken as of right but may only be taken upon the allowance thereof by the Court of Appeals in its discretion. This Court said in the *Dickinson* case, at page 385 of the U.S. Report:

> "Our view, however, is that appeals from all orders making or refusing to make allowances of compensation or reimbursement under Chap. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals."

The petitioners have never filed a petition for permission to appeal with the Court of Appeals for the Seventh Circuit. *Cohen v. Casey*, 152 F(2d) 610 (1st Cir. 1945).

Moreover, the petition for writ of certiorari as it applies to the trustee is untimely. The court below dismissed the appeal from allowances on September 13, 1960. Petitioners should have filed their petition for a writ of certiorari on the question of allowances on or before December 13, 1960, pursuant to 28 U.S.C. 2101(c). The petition for writ of certiorari was filed on March 16, 1961.

II.

Injunction Issue

On February 10, 1959, the District Court entered an order restraining the calling or conducting of a meeting of stockholders for the purpose of electing directors until further notice. The notice of appeal from this order was not filed until February 23, 1960, more than one year later.

This appeal is governed by the provisions of Sections 24 and 25 of the Bankruptcy Act (11 U.S.C. Sec. 47 and 11 U.S.C. Sec. 48). Section 24 provides in pertinent part:

> "a The United States Courts of Appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in

controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matter of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only: *And provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"b Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

See section 25 as set forth at page 6 of this brief.

The court below held that the appeal of the District Court's injunctive order in this case was a "proceedings in bankruptcy" order distinguishing it from "controversies arising in bankruptcy." The court based this holding on *Albin v. Cowing Pressure Relieving Joint Co.* 317 U.S. 211, 63 S.Ct. 170, 87 L.Ed. 212 (1942), in which the court said at page 212 of the U.S. Report:

"Section 24(a) of the Chandler Act ([June 22, 1938] 52 Stat. at L 840,854, chap 575, 11 USCA § 47) gives the Circuit Courts of Appeals appellate jurisdiction from courts of bankruptcy 'in proceedings in bankruptcy, either interlocutory or final.' An order of the bankruptcy court vacating a restraining order against prosecution of a suit in a state court is, like a stay order itself, a proceeding in bankruptcy. See Harrison Securities Co. v. Spinks Realty Co. (CCA 9th) 92 F (2d) 904, 35 Am Bankr Rep (NS) 288; Taylor v. Voss, 271 US 176, 181, 70 L Ed. 889, 892, 46 S. Ct. 461, 7 Am Bankr Rep (NS) 706. The amendments to § 24(a) made by the Chandler Act practically abolished the distinction between appeals as of right and by leave. S. Rep. No. 1916, 75th Cong. 3d Sess. p 4. And see Dickinson Industrial Site v. Cowan, 309 US 382, 385.

388, 84 L Ed. 819, 823-825, 60 S. Ct. 595, 42 Am Bankr Rep (NS) 209. . . ."

The court below further held that since interlocutory orders in "proceedings in bankruptcy" are appealable, the injunctive order of the District Court should have been appealed within the time allotted for appeals by Sec. 25 of the Bankruptcy Act (11 U.S.C. 48). The maximum time under said section is forty days from the entry of the order. Petitioners took no steps to perfect an appeal of the injunctive order in this case for more than one year.

The conclusion of the court below that petitioners were not entitled to an appeal from the injunctive order because it was untimely was obviously correct.

CONCLUSION

It is respectfully submitted that the court below ruled correctly in dismissing the appeal from the allowance orders of May 22, October 15 and November 17, 1959, and the injunctive order of February 10, 1959, on the grounds that the appeals from said orders were untimely. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

IN THE MATTER OF EVANSVILLE TELEVISION, INC., DEBTOR, REX SCHEPP and BENJAMIN F. SHEPP, *Appellants.* v. PRODUCERS, INC., et al., *Appellees.*	Cause No. 13024

MOTION TO DISMISS APPEAL

The appellee, Douglas H. McDonald, trustee of Evansville Television, Inc., debtor, moves to dismiss the appeal herein by Rex Schepp and Benjamin F. Shepp from the orders authorizing and directing the payment of compensation to the trustee, and to counsel for the said trustee, for the following reasons:

1- The notice of appeal is untimely; and

2- The appellants have failed to obtain leave of court to appeal.

s/John K. Rickles

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APPENDIX B

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

September 13, 1960.

Before

HONORABLE F. RYAN DUFFY, *Circuit Judge*
HONORABLE WIN G. KNOCH, *Circuit Judge*
HONORABLE LATHAM CASTLE, *Circuit Judge*

In the Matter of Evansville Television, Inc., Debtor. REX SCHEPP and BENJAMIN F. SHEPP, *Appellants.* v. PRODUCERS, INC., et al., *Appellees.*	No. 13024

Appellee, Douglas H. McDonald, Trustee of Debtor, having moved to dismiss the appeal by Rex Schepp and Benjamin F. Shepp from orders of the Court dated May 22, 1959, October 15, 1959 and November 17, 1959, which allowed fees and expenses to the Trustee, to Counsel for the Trustee, and for the Accountant for the Trustee, respectively, said notice of appeal being filed February 23,

1960; and it appearing that said notice of appeal also appealed from the order of the District Court dated February 12, 1960, approving the petition for reorganization;

IT IS ORDERED that the purported appeal from the orders dated May 22, 1959, October 15, 1959 and November 17, 1959 were not timely, and the motion to dismiss the appeal as to said orders should be granted;

IT IS FURTHER ORDERED that the appeal from said orders of May 22, 1959, October 15, 1959 and November 17, 1959 be and the same is hereby dismissed.